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Supreme Court, U.S.
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No. 91-1726

In The

Supreme Court of the United States

October Term, 1991

PHANTOM TOURING COMPANY,

Petitioner,

vs.

AFFILIATED PUBLICATIONS, INC., GLOBE NEWSPAPER COMPANY, KEVIN KELLY and PATTI HARTIGAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

E. SUSAN GARSH
Counsel of Record
JONATHAN M. ALBANO
PATRICIA J. HILL
BINGHAM, DANA & GOULD
Attorneys for Respondents
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000

2013
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QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit properly held that certain newspaper columns and articles concerning petitioner's marketing of a musical comedy version of *The Phantom of the Opera* could not reasonably be interpreted as stating provably false statements or actual facts about the petitioner.

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No. 91-1726

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PHANTOM TOURING COMPANY,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE[1]

I. Factual Background

This diversity action was filed by petitioner Phantom Touring Company in November of 1989 in the United States District Court for the District of Massachusetts (Appendix to Petition for Certiorari, p. 5a, hereinafter "App. ____"). Petitioner is the producer of Ken Hill's theatrical version of *The Phantom of the Opera* (hereinafter "Phantom"), which was presented at the Wang Center for Performing Arts in Boston in January 1990 (App. 3a, 22a).

Hill conceived his version of Phantom in 1976 and presented it for the first time in 1977 at the Duke's Playhouse in London (Statement of Ken Hill, Respondents' Addendum at 1, hereinafter "Add. ____).[2] Hill's production was a musical comedy and used the work of composers such as Bach, Mozart, Offenbach, Verdi and Gounod (Record Appendix before the Court of Appeals, pp. 31, 61, hereinafter "R.A. ____").

In 1984, seven years after its first showing, the Hill Production again was staged in London in the Theatre Royal, where Andrew Lloyd Webber saw it (Add. 1-2). The production "was planned for a run of only a few weeks at a small theatre" (Add. 1). After two years of further silence, the Hill production next played St. Louis in 1986 for four weeks (Add. 1).

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1. Respondent Globe Newspaper Co. ("Globe") is a wholly owned subsidiary of Affiliated Publications, Inc. ("Affiliated"). Affiliated has no parent company. Neither the Globe nor Affiliated has any non-wholly owned subsidiaries or affiliates that have issued shares to the public.

2. The Statement of Ken Hill was filed by petitioner in opposition to respondents' motion for judgment on the pleadings and is part of the record below.

In October of 1986, Webber staged his own version of *The Phantom of the Opera* in London and opened the show on Broadway in January of 1988 (Add. 2). Webber's show was a drama and had its own original musical score (App. 4a). The production received wide acclaim and broke records in both cities (App. 27a, 35a).

In September of 1988, while Webber's Phantom was on Broadway, Hill's production was revived and began a nine-month San Francisco tour (Add. 3). Petitioner conceded below that the decision to begin a national tour of Hill's Phantom was not made until after the San Francisco production which, it also is conceded, did not begin until eight months *after* Webber's Broadway hit was underway (Add. 2-3).

In 1989, the Webber production was continuing its successful Broadway run while the Hill show moved to Georgia (R.A. 32, 62). In May of 1989, as tickets to the Hill production went on sale in Georgia, the Governor's Office of Consumer Affairs issued a cease and desist order against the promoter of the Hill production in Atlanta prohibiting it from selling tickets without clearly disclosing that its production was not the Andrew Lloyd Webber Phantom (R.A. 32, 62).

As the Hill tour continued, *The Boston Globe* (the "Globe"), in several articles and columns, questioned whether the advertising for the Hill production at the Wang was adequate to prevent confusion on the part of theatre-goers (App. 22a-37a). Before the production's arrival in Boston, theatre critic Kevin Kelly quoted unfavorable reviews of the Hill version by out of state critics in his "Backstage" column, and contrasted them to the acclaim surrounding the Webber production (App. 22a-25a). In other columns, Kelly described the potential for confusion on the part of ticket buyers and reported the reaction of the play's producers and promoters to this issue (App. 34a-36a). Globe reporter Patti

Hartigan noted that the producer's measures to distinguish its play from the Webber version did not appear to affect ticket sales in Boston, which were very high (App. 27a-29a). She also reported on the public debate surrounding the play's publicity (App. 37a-38a). A summary of the five Globe columns and articles challenged by petitioner is set forth below.

A. "The Phantom of 'The Phantom' " in "Backstage" column by Kevin Kelly, Boston Globe, September 22, 1989.

The first article for which petitioner seeks relief is a regularly run theatre column titled "Backstage" (App. 22a-26a). The central theme of the article is a rhetorical question posed by Kelly: "[I]s Hill & Company trying to score off the success of Andrew Lloyd Webber's 'Phantom'?" (App. 24a). Kelly's query is followed by a two paragraph retort from Jonathan Reinis, the American producer of the Phantom (App. 24a-25a). Although Reinis' favorable views are not challenged by petitioner, the inclusion of opposing viewpoints, according to petitioner, renders the article libelous. The offensive views include a quote from the Washington Post drama critic David Richards that the Hill production is "a rip-off, a fraud, a scandal, a snake-oil job" and Kelly's own opinion that "[a]dmittedly or not, Hill has been thriving off the confusion created by the two productions" (App. 22a-23a).

Similarly, while petitioner takes no issue with Kelly's description of the literal accuracy of the headline of the Hill production's advertisement as the "Original London production", it argues that liability should be imposed for Kelly's characterization of the ads as a "subliminally deliberate [link to Webber's $5 million 'Phantom']" and as "truth in advertising with an undertow" (App. 23a).

B. "Ticket buyers are still hot for 'Phantom' " by Patti Hartigan, Boston Globe, October 5, 1989.

In this news story, Patti Hartigan reports on booming Phantom ticket sales at the Wang (App. 27a-29a). Petitioner's statement of the case narrows the allegedly actionable material to one sentence in which Ms. Hartigan explains that the production "is being billed as 'the Original London Stage Musical' but is in no way related to the Andrew Lloyd Webber 'Phantom' . . ." (App. 27a). The truthfulness of the challenged statements, however, has been conceded by petitioner (R.A. 31, 61).

C. " 'Fiddler' is the real thing" by Kevin Kelly, Boston Globe, October 5, 1989.

This Kelly column is a review of a production of "Fiddler on the Roof" which includes two references to petitioner's production (App. 30a-33a). While Kelly lauds "Fiddler" in the review, he criticizes the Hill production by comparison. Petitioner specifically objects to Kelly's statement that "hordes of people are currently being suckered in by a second-hand version of 'Phantom' " and his reference to "misleading ads ['The Original London Stage Musical'] subliminally linking" the Hill production to the Webber version (App. 30a, 32a).

D. "Canny, confusing marketing for this 'Phantom' " in "Backstage" column by Kevin Kelly, Boston Globe, October 6, 1989.

Petitioner targets this second "Backstage" column because Kelly raises several questions — some posed rhetorically and some posed to individuals he has interviewed — about the marketing of Hill's Phantom (App. 34a-36a). Kelly first recounts the inquiry he posed to Josiah Spaulding, the head of the Wang that "he [Spaulding] must be aware the incoming Phantom . . . is

deliberately confusing people" (App. 34a). The question is followed directly by Spaulding's response.

The article continues with two paragraphs in which Kelly provides the detail of the Phantom advertisements, including the relative minuteness of their disclaimers when compared to the prominence of their label, "Original London Stage Musical", and facts regarding the comparative chronologies of the two plays (App. 35a). While petitioner never has alleged that the production chronologies contained in the article are false, the questions raised by Kelly, highlighted below, are claimed to be defamatory:

> So what precisely does the Wang Center mean when it says it will keep the public apprised? Are we really to believe that over $400,000 worth of tickets were sold in a few days for an operatic spoof, a spoof without stars or anyone of theatrical name value? *Are we to believe that out of nowhere has swirled an anonymous "Phantom" with enough artistry to compete with its better-known counterpart?* Are we to applaud the Wang Center for attending people waiting in line and giving them coffee and saying, "This is not by Andrew Lloyd Webber"? *Is that enough to justify a rip-off?*

(App. 35a-36a).

E. "Williams and 'The Phantom' " by Patti Hartigan, Boston Globe, October 7, 1989

In this article, Patti Hartigan reports on the public debate surrounding the Phantom publicity (App. 37a-38a). The article discloses the particulars of the advertising and reports that a Wang Center spokesman admitted that "about a dozen people had requested refunds" after learning that their tickets would not admit

them to the Webber play (App. 37a). Petitioner never has taken issue with the accuracy of these facts. It claims, however, that the article is actionable because it reports that a local radio talk-show host said he was "taken in" by the advertising for "the phony 'Phantom' " and because it republishes Kelly's belief that the show's promoters "were blatantly misleading the public" (App. 37a).

II. Proceedings Below

Petitioner's complaint was filed on November 3, 1989 (R.A. 2). The complaint sought preliminary and permanent injunctive relief against further Globe publications concerning petitioner's show and damages for interference with contractual relations, interference with prospective advantageous relations, libel and slander (R.A. 4-19).

On November 27, 1989, respondents moved for judgment on the pleadings (R.A. 2). The factual record before the District Court included the complaint, respondents' answer and counterclaim, petitioner's reply to the counterclaim, and a sworn statement submitted on behalf of petitioner by Ken Hill in opposition to respondents' motion (R.A. 2, Addendum hereto). *See also* Fed. R. Civ. P. 12(c) ("if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment").

On January 5, 1990, the District Court ruled that the articles contained only protected expressions of opinion and entered judgment for the respondents (App. 18a-19a). The Court did not expressly indicate whether the decision was based on state or federal law. Thereafter, on April 18, 1990, petitioner's motion for reconsideration, predicated on this Court's decision in *Milkovich v. Lorain Journal Co.*, ____ U.S. ____, 110 S. Ct. 2695

(1990), was denied (App. 20a). The only aspect of the judgment challenged on appeal was the dismissal of petitioner's libel claims (App. 3a, n.1). On January 10, 1992, the Court of Appeals for the First Circuit affirmed the judgment of the District Court (App. 1a).

REASONS FOR DENYING THE WRIT

I.

THE FIRST CIRCUIT PROPERLY APPLIED THE STANDARDS SET FORTH IN *MILKOVICH* TO THE UNDISPUTED FACTS OF THIS CASE.

Reduced to essentials, petitioner objects to what it contends is an erroneous result reached by the application of the standards enunciated in *Milkovich* to the facts of this case. No important legal questions of general applicability are raised. No conflict between decisions of the Court of Appeals is implicated.[3] Because the petition centers upon an analysis of petitioner's view of the particular facts involved, certiorari is not warranted. *See generally United States v. Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.") *Graver Tank & Mfg. Co. v Linde Air Products Co.,* 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact-finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."). *See also National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.,* 454 U.S. 170 (1924); *Southern Power Co. v. North Carolina Public Service Co.,* 263 U.S. 508 (1924).

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3. That petitioner perceives a conflict between *Milkovich* and two commentators on libel law is, of course, no substitute for a conflict between the Circuits. *See* Petition at 12-13.

To be sure, petitioner attempts to characterize the First Circuit's decision as a departure from the rules announced in *Milkovich*. That argument, however, cannot survive a reading of either *Milkovich* or the Court of Appeals' opinion. The essence of the holding in *Milkovich* was succinctly stated by the Court of Appeals:

> In *Milkovich*, the Supreme Court dismissed the notion that there is a "wholesale defamation exception for anything that might be labeled 'opinion'." 110 S. Ct. at 2705. It concluded that the relevant question is not whether challenged language may be described as opinion, but whether it reasonably would be understood to declare or imply provable assertions of fact.

Phantom Touring, Inc. v. Affiliated Publications, et al., 953 F.2d 724, 727 (1st Cir. 1992).

As the First Circuit noted, the *Milkovich* Court found that three independent constitutional protections for speech adequately protected the "breathing space" which "freedoms of expression require in order to survive" without the creation of an "artificial dichotomy between 'opinion' and fact." *Milkovich*, 110 S. Ct. at 2706; *Phantom*, 953 F.2d at 727-28.

> Foremost, we think [*Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 707 (1986)] stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation laws, at least in situations, like the present, where a media defendant is involved . . . *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false

> factual connotation will receive full constitutional protection.

Milkovich, 110 S. Ct. at 2306. The Court of Appeals, quoting and relying upon *Milkovich's* discussion of *Hepps*, accordingly held that statements that are not susceptible of being proved true or false are not actionable. *Phantom*, 953 F.2d at 727

The Court of Appeals relied on *Milkovich's* express approval of a prior line of cases in holding that statements which can not reasonably be interpreted as stating actual facts about a person also are privileged under the First Amendment. *Phantom*, 753 F.2d at 727; *Milkovich*, 110 S. Ct. at 2704-05, 2706-07. *See Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970) (statement that developer had engaged in blackmail by negotiating to sell city a parcel of land while attempting to obtain a zoning variance on his own behalf was constitutionally protected rhetorical hyperbole); *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1975) (use of word traitor not basis for defamation action when used in loose, figurative sense); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (First Amendment prohibits recovery for publication which "could not reasonably have been interpreted as stating actual facts about the public figure involved"). *See also Milkovich*, 110 S. Ct. at 2706 ("the *Bresler - Letter Carriers - Falwell* line of cases provide protection for statements that cannot reasonably [be] interpreted as stating actual facts about an individual").

The third independent protection for speech confirmed by *Milkovich*, and articulated by the First Circuit below, is the enhanced appellate review of the record required by *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). That heightened level of review "provides assurance that the foregoing determinations will be made in a manner so as not to 'constitute a forbidden intrusion of the field of free

expression.' " *Milkovich*, 110 S. Ct. at 2707 (citation omitted); *Phantom*, 953 F.2d at 727-28.

The tripartite analysis employed by the Court of Appeals thus mirrors perfectly the explicit reasoning and language of *Milkovich*. In accordance with those principles, the Court of Appeals correctly framed its ultimate inquiry as whether the challenged statements reasonably could be understood as stating provable assertions of actual facts. *Phantom*, 953 F.2d at 727, 729-31. *Milkovich* similarly stated that the "dispositive question [is] whether or not a *reasonable* fact finder could conclude that the statements in the [defendant's] column imply an assertion that [the plaintiff] perjured himself." *Milkovich*, 110 S. Ct. at 2707 (emphasis added). *See also Hustler*, 485 U.S. at 50 (publication "could not reasonably have been interpreted as stating actual facts"). *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find . . . that the plaintiff is entitled to a verdict . . .").

In applying the very same standard of whether the challenged statements reasonably could be read as actionable (not some higher, undefined standard as argued by petitioner, *see* Petition at 11, 15), the *Milkovich* Court considered the underlying circumstances of the case, including the nature of the language used, the "general tenor of the article" and whether the defamatory charge was "sufficiently factual to be susceptible of being proved true or false." *Milkovich*, 110 S. Ct. at 2703. *Cf. Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to prevent summary judgment]."). The Court of Appeals thus was fully warranted under *Milkovich* in engaging in a similar analysis of the context and language used in the articles at issue. *Phantom*, 953 F.2d at 728-31.

In view of the Court of Appeals' express application of the three part analysis of *Milkovich*, as well as its adherence to what *Milkovich* described as the "dispositive question" of what a reasonable factfinder could conclude based upon the circumstances of the case before it, the petitioner's assertion that the lower court's analysis was "squarely inconsistent with the governing pronouncement of [*Milkovich*]" is, to be blunt, wholly groundless. Petition at 10. An examination of the purported basis for certiorari reveals that the true gist of the petition is to obtain review not of the legal principles applied by the First Circuit but rather of the conclusions reached when those principles were applied to the facts of this case. Certiorari, however, is not intended for such purposes. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (a perceived error in the judgment reached below is not sufficient by itself to warrant certiorari review); *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.")

That is especially so where, as here, the result reached by the Court of Appeals' application of law to the facts of the case is indisputably correct. Respondents' statements that the Hill production is in no way related to the Webber "smash hit" are concededly true and therefore not actionable. Similarly, the unchallenged accuracy of the Report that the Georgia Office of Consumer Affairs investigated the marketing of Hill's Phantom precluded any recovery for such statements. *Phantom*, 953 F.2d at 728-29.

In ruling that it was impossible to verify if Hill's Phantom was "fake" or "phony" or whether its advertising was "subliminally deliberate" or "blatantly misleading the public", the Court properly applied the protections established by *Hepps*

for statements incapable of being proven true or false. So too, the Court correctly held that Kelly's use of such figurative terms as "rip-off, a fraud, a scandal, a snake-oil job" and "truth-in-advertising with an undertow" was fully protected in accordance with the actual facts rationale of *Bresler, Letter Carriers,* and *Falwell. See Phantom,* 953 F.2d at 728.

The Court of Appeals also properly disposed of petitioner's claims that Kelly implied that the marketing for Hill's Phantom was deliberately deceiving the public. *Phantom*, 953 F.2d at 729-31. Indeed, the undisputed inclusion of statements by petitioner in its Massachusetts advertising — albeit in small print — that its show is not the Webber production and a disclaimer to that effect posted at the Wang box office window demonstrate that petitioner itself believed the public needed to be warned to avoid deception. Kelley took issue with the prominence of those warnings, which obviously had been deliberately drafted by petitioner or its agents. Petitioner makes much of the First Circuit's statement that "[a]rguably, the connotation of deliberate deception is sufficiently factual to be proved true or false," such proof being the linchpin of *Hepps'* protection *vel non* for speech. *Id.* at 727, 729. *See also* Petition at 10-11. Petitioner did not, however, demonstrate its falsity. Moreover, by focusing on its prospects under *Hepps*, petitioner ignores the Court's holding that the statements were not reasonably interpreted as stating "actual facts" about petitioner's honesty under the independent *Bresler - Letter Carriers - Falwell* line of cases. *Id.* at 727, 729.

In order to determine whether the statements were protected under *Bresler* and its progeny, the Court of Appeals correctly analyzed the format, tone and content of the articles. In *Bresler*, for example, the Court held that two newspaper articles characterizing a developer's position as "blackmail" were not actionable. In so ruling, the Court examined the statements in context, noting that the reports were "full and accurate," and

that the result might be different "if the reports had been truncated or distorted." 398 U.S. at 13.

> [Petitioner's] proposal was accurately and fully described in each article, along with the accurate statement that some people at the meetings had referred to the proposal as blackmail, and others had indicated they thought Bresler's position not unreasonable.

398 U.S. at 14. *Contrast Milkovich*, 110 S. Ct. at 2698 (column stated that coach "beat the law with the 'big lie' ", and lied his way out of "jam" and that the "judge apparently believed" him, whereas, in fact, the judge overturned his suspension solely on due process grounds, which was not reported). *See also Letter Carriers*, 418 U.S. at 286 (holding that the use of word "traitor" by a union newspaper during a labor dispute did not, in context, state actionable fact about plaintiff).

As in *Bresler* and *Letter Carriers*, the Court of Appeals analyzed the challenged language and its context and determined that a reasonable jury could not conclude that the statements were asserting actual facts about the petitioner. *Phantom*, 953 F.2d at 730.

> Because all sides of the issue, as well as the rationale for Kelly's view, were exposed, the assertion of deceit reasonably could be understood only as Kelly's personal conclusion about the information presented, not as a statement of fact.
>
> * * *
>
> Kelly's full disclosure of the facts underlying his judgment — none of which has been challenged

> as false — makes this case fundamentally different from *Milkovich*.
>
> In this case, the comprehensive nature of the information provided in the articles, aided by the style and tenor of the writing, lead inevitably to the conclusion that no reasonable reader could interpret Kelly's statements as factual assertions of dishonesty. Accordingly, under *Milkovich*, they are not actionable.

Id. at 730-31.

It is not enough to say, as petitioner does, that because deceptive business practices sometimes can be proved in court, allegations of such conduct always must be deemed assertions of actual facts. It is true that the charge of perjury at issue in *Milkovich* was considered verifiable in a perjury action. 110 S. Ct. at 2707. It is also true that charges of blackmail and treason similarly may be proven at trial but, as *Bresler* and *Letter Carriers* demonstrate, such charges are not in all instances assertions of actual facts. Only through an examination of the context and language at issue can distinctions be drawn between what is and what is not an assertion of actual fact.

The Court of Appeals recognized the need to go beyond incantations of buzz words to resolve whether the statements at issue were assertions of actual fact. The Court properly considered the context and language of the entire articles. Its holding is nothing more than a particularized determination that in articles in which factual premises were revealed, respondents' statements could not reasonably be viewed as statements of fact. In reaching its decision, the Court faithfully adhered to the principles of *Milkovich* and reached the correct result. That petitioner disagrees with the judgment reached is not a sufficient basis to grant certiorari.

II.

GRANTING THE PETITION WOULD BE IMPROVIDENT SINCE THE JUDGMENT IS CORRECT AS A MATTER OF STATE LAW.

This Court has stressed that certiorari jurisdiction should be reserved for cases presenting significant issues of federal law and may be denied when the judgment below is correct on another ground. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). In this case, as respondents argued in both lower courts, state law requires the dismissal of petitioner's complaint regardless of petitioner's federal arguments.[4] Under these circumstances, certiorari review is not warranted.

In the leading decision of *National Association of Government Employees*, 379 Mass. 200, 396 N.E. 2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980), the Massachusetts Supreme Judicial Court recognized a privilege for opinions based upon disclosed facts. The Court explicitly stated that although such statements of opinion appeared privileged under the First Amendment,

> [even] *were it not constitutionally required*, we would reach the same result, believing that the action is plainly without merit and the prospect

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4. The Court of Appeals recognized that Massachusetts has "immunized statements of opinion based on fully disclosed non-defamatory facts," 953 F.2d at 737, n.13, but chose not to reach the state law grounds. *Id.* at 727, n.4. It is well-established that a prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20 (1979).

> of forcing the defendant to trial in such a case would put an unjustified and serious damper on freedom of expression.

379 Mass. at 233, 396 N.E. 2d at 1004 (emphasis added). *See also Myers v. Boston Magazine Co., Inc.*, 380 Mass. 336, 340-41, n.5, 403 N.E. 2d 376, 379, n.5 (1980) (explaining that *National Ass'n of Gov't Employees* involved an "allegedly libelous statement [that] was an opinion based on disclosed facts," and therefore was nonactionable under the state standard).

Similarly, in *Pritsker v. Brudnoy*, 389 Mass. 776, 452 N.E. 2d 227 (1983), the Supreme Judicial Court reaffirmed the protections for statements of opinion based upon disclosed facts and noted that the privilege was not a function of federal grace alone:

> *However, [Massachusetts] cases also* recognized the distinction, expressed in Restatement (Second) of Torts § 566 (1977), between "pure" opinions — those based on disclosed or assumed nondefamatory facts — and "mixed" opinions — those opinions apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication.

389 Mass. at 778, 452 N.E. 2d at 228 (emphasis added). *See also Fleming v. Benzaquin*, 390 Mass. 175, 454 N.E. 2d 95 (1983).

Since all of the challenged statements are concededly true, hyperbole, or expressions of opinion based upon fully disclosed facts, the application of state law upon remand would result in the affirmance of the judgment for the respondents. Because the time and resources of this Court could be better allocated towards

those classes of cases involving the necessary determination of substantial federal questions, certiorari is not warranted. *See Dick v. New York Life Insurance Co.*, 359 U.S. 437, 459 (1959) (Frankfurter, J. dissenting) ("The litigious tendency of our people and the unwillingness of litigants to rest content with adverse decisions after their cause has been litigated in two and often in three courts, leads to attempts to get a final review by the Supreme Court in literally thousands of cases which should never reach the highest Court of the land.")

CONCLUSION

For each of the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

E. SUSAN GARSH
Counsel of Record
JONATHAN M. ALBANO
PATRICIA J. HILL
BINGHAM, DANA & GOULD
Attorneys for Respondents

ADDENDUM — STATEMENT OF KEN HILL

The idea to stage a musical version of "The Phantom of the Opera" was first conceived in 1976 by veteran English playwright and director Ken Hill. If there were earlier versions, he is unaware of them.

He had read the original novel by Gaston Leroux, now in public domain, and was inspired by it when commissioned for a new musical play by the Duke's Playhouse, Lancaster, his only previous experience of the story being the Universal movie of 1943, which did not closely follow the book. Hill did not see the Lon Chaney movie of 1925 until some years after his own production. Defendant's allegation in paragraph 6 of their Counterclaim, that Hill's play was inspired by this movie, is yet another example of the blatant and groundless fabrications engaged in by these defendants. The musical was publicly performed at the Duke's Playhouse, Lancaster in 1977, and contained an original score by an English Composer and a number of original approaches to scenes and characters which differ from the original novel.

In 1984, Hill's Phantom was presented in a slightly different form (tunes from Opera forming the basis of all the songs) at the Theatre Royal in London's East End. The tunes for this were researched by the head of Classical Records, E.M.I., Great Britain, one of his suggestions being a moment from Der Freischutz by Carl Maria von Weber. At no time did it occur to either that there was any similarity between this name and Andrew Lloyd Webber. Nor could it possibly have had any effect. The suggestion that this was deliberate is deeply offensive to both parties. The original production was planned for a run of only a few weeks at a small theatre.

Andrew Lloyd Webber read some of the favorable reviews Hill's Phantom was receiving, and after attending one of its

performances, Webber approached Hill to suggest that the two men cooperate in bringing Hill's musical to London's West End. Webber later played Hill a tune of his own he thought should be included in the production. He also suggested other pieces of opera, together with certain changes to some scenes. Hill researched these suggestions, and began writing the suggested changes sending all the material to Webber. After some weeks, however, Webber decided not to follow up his suggested cooperation, and asked his Producer to convey this fact to Hill. He returned none of Hill's scripts or re-writes, and has not communicated with him since. The song he played is now in his own version.

In July 1986 (some three months *before* Webber's Phantom first opened to the public), Hill's Phantom was presented in St. Louis. It attracted the attention of Don Hughes and his partner Jonathon Reinis, theatre producers based in San Francisco. Reinis's corporation, Jonathon Reinis, Inc., is one of the principals of plaintiff Phantom Touring Company, a general partnership. They intended to bring Hill's Phantom to Reinis's theater in San Francisco, and began negotiations toward that end during the four-week St. Louis production, still months before the public had ever seen Webber's version.

On October 29, 1986, Andrew Lloyd Webber's Phantom first opened to the public, at Her Majesty's Theater in London. Over a year later, Webber's Phantom moved to New York, where it opened at the Majestic Theater on January 26, 1988. Surprisingly, Webber's Phantom contained a number of the original approaches to scenes and characters added to the story by Hill in his stage adaption, and which were not fully a part of the original, public-domain novel.

Addendum

Hill's version, meanwhile, was the subject of the uninterrupted efforts of Reinis to bring the show to San Francisco, beginning even before its closing in St. Louis. The San Francisco production finally opened on September 9, 1988, and enjoyed a highly successful nine-month run there. The success in San Francisco led Reinis and others to join forces in the current Phantom Touring Company, to present the ongoing national tour of Hill's Phantom. This production is in every respect, apart from minor detail, identical with the original London Production, which not only received such good press but inspired Andrew Lloyd Webber to approach Hill.

Add. 4

Addendum

VERIFICATION

I, KEN HILL, do swear and affirm that I have read the foregoing statement of facts concerning the timing of the writing, production and staging of "The Phantom of the Opera", by Ken Hill, based upon the novel by Gaston Leroux, and that the statement of such facts is true and correct to the best of my knowledge, information and belief.

s/ Ken Hill